

1 Robert W. Boatman (009619)
2 Paul L. Stoller (016773)
3 Shannon L. Clark (019708)
4 GALLAGHER & KENNEDY, P.A.
5 2575 East Camelback Road
6 Phoenix, Arizona 85016-9225
7 Telephone: (602) 530-8000
8 rwb@gknet.com
9 paul.stoller@gknet.com
10 SLC@gknet.com
11 Ramon Rossi Lopez (CA Bar No. 86361)
12 (admitted *pro hac vice*)
13 LOPEZ McHUGH LLP
14 100 Bayview Circle, Suite 5600
15 Newport Beach, California 92660
16 rlopez@lopezmchugh.com
17 *Co-Lead/Liaison Counsel for Plaintiffs*

18 James R. Condo (#005867)
19 Amanda C. Sheridan (#027360)
20 SNELL & WILMER L.L.P.
21 One Arizona Center
22 400 E. Van Buren, Suite 1900
23 Phoenix, Arizona 85004-2202
24 Telephone: 602.382.6000
25 Facsimile: 602.382.6070
26 jcondo@swlaw.com
27 asheridan@swlaw.com
28 Richard B. North, Jr. (admitted *pro hac vice*)
29 Georgia Bar No. 545599
30 Matthew B. Lerner (admitted *pro hac vice*)
31 Georgia Bar No. 446986
32 NELSON MULLINS RILEY & SCARBOROUGH LLP
33 201 17th Street, NW / Suite 1700
34 Atlanta, GA 30363
35 Telephone: (404) 322-6000
36 Telephone: (602) 382-6000
37 richard.north@nelsonmullins.com
38 matthew.lerner@nelsonmullins.com
39 *Attorneys for Defendants C. R. Bard, Inc. and*
40 *Bard Peripheral Vascular, Inc.*

41
42 IN THE UNITED STATES DISTRICT COURT
43
44 FOR THE DISTRICT OF ARIZONA

45 IN RE: Bard IVC Filters Products
46 Liability Litigation,

47 No. 2:15-MD-02641-DGC

48
49 **THE PARTIES' JOINT STATUS
50 REPORT FOR THE OCTOBER 14,
51 2016 CASE MANAGEMENT
52 CONFERENCE**

1 In accordance with Paragraph L of Case Management Order No. 15 [Doc. 3214],
 2 the Parties hereby submit their Joint Status Report for the October 14, 2016 Case
 3 Management Conference.

4 **I. Fact Discovery**

5 The following depositions have been completed:

6	December 15, 2015	30(b)(6) re FDA Warning Letter
7	January 11, 2016	Kay Fuller
8	January 20, 2016	Continued 30(b)(6) re FDA Warning Letter
9		
10	March 18, 2016	30(b)(6) re corporate structure
11	April 27, 2016	30(b)(6) re ESI systems structure
12	May 3, 2016	Dr. Murray Asch
13	May 11, 2016	Carol Vierling
14	May 17, 2016	Anne Bynon
15	May 24, 2016	Len DeCant
16	June 2, 2016	John DeFord
17	June 9, 2016	Bret Baird
18	June 16, 2016	Robert DeLeon
19	June 17, 2016	Joe DeJohn
20	July 18, 2016	Abithal Raji-Kubba
21	July 27, 2016	Bill Little
22	July 27, 2016	Judy Ludwig
23	July 29, 2016	John Wheeler
24	August 9, 2016	Maureen Uebelacker
25	August 16, 2016	Daniel Orms ¹
26	August 19, 2016	Mary Edwards

27
 28 ¹ Mr. Orms was deposed in the state court action Austin v. C.R. Bard, et al., in Broward
 County, Florida, and cross-noticed in the MDL for coordination purposes.

1	August 24, 2016	Cindi Walcott
2	August 30, 2016	30(b)(6) re REACH program
3	September 7, 2016	Steve Williamson
4	September 7, 2016	30(b)(6) re Sales/Marketing
5	September 7, 2016	Kevin Shifrin
6	September 16, 2016	Jack Sullivan ²
7	September 19, 2016	Brian Doherty
8	September 23, 2016	Holly Glass
9	September 29, 2016	John Van Vleet

10 The following depositions have been scheduled:

11	October 11, 2016	Chris Ganser
12	October 18, 2016	Natalie Wong
13		October 28, 2016
	Dr. David Peeler	

14 **II. ESI Discovery Status**

15 The Court held conference calls with the parties on August 31 and September 7
 16 regarding the status of Defendants' production of ESI. The Parties subsequently filed a
 17 Joint ESI Status Report [Doc. 3494] on September 23, 2016. Defendants further updated
 18 the Court regarding the timing of their productions in a conference call on October 3.

19 Since receiving Plaintiffs' revised agreed upon keyword and fuzziness search terms
 20 on September 14, 2016, Bard has produced about 2.2 million pages. Since the last Case
 21 Management Conference on August 21, 2016, Bard has produced over 2.4 million pages.
 22 Overall, in this MDL, Bard has produced a total of about 2.9 million new pages beyond
 23 the more than 2.5 million pages Bard produced in prior litigation.

24 Bard has now essentially completed its document production. The only exceptions
 25 are any potential documents subsequently determined not to be privileged (from a subset
 26 of documents undergoing privilege review) and approximately 5,000 documents that are

27
 28 ² The parties have agreed to resume Mr. Sullivan's deposition for an additional two hours
 of examination by Plaintiffs.

1 primarily being reviewed for redaction of highly sensitive non-filter data and are
2 otherwise related to quality control. Those small tasks should be completed in the next
3 several days.

4 At Plaintiffs' request, the parties have agreed on a procedure by which they will
5 test the pool of documents and files that were not identified for collection by their agreed
6 search process (the "non-responsive pool"), now that the production is nearly complete.³
7 The purpose of that testing is to determine whether the parties' agreed search process
8 performed consistently with their expectations with respect to the identification of
9 relevant documents. If the parties learn through that testing that their search methodology
10 did not perform consistently with their expectations for the identification of relevant
11 documents, they will meet and confer regarding additional search or searches through the
12 non-responsive pool to identify relevant documents. In that event, there may be additional
13 production(s) of relevant ESI.

14 **III. Extension of Discovery Schedule**

15 As a result of the timing and size of Defendants' production of ESI, Plaintiffs
16 request an extension of the current discovery deadlines. In particular, Plaintiffs believe
17 that they will need approximately six weeks to complete their review of the millions of
18 pages of newly produced documents and then 10-12 weeks (including the intervening
19 year-end holidays) to complete discovery.

20 The Defendants recognize that the timing of the ESI production may justify a brief
21 extension of the fact discovery period. However, the Defendants believe that, given the
22 extensive scope of discovery already completed and significant proportionality concerns

23 ³ Defendants contend that the Plaintiffs' late demand for a post-production sampling
24 exercise is but a further example of the Plaintiffs' delaying Bard's document production
25 and why the volume of the ESI production in this case has been so substantial. At every
26 decision point, the plaintiffs have repeatedly pressed to expand the scope of ESI
27 production as much as possible. The defendants have ultimately acceded to those
28 demands in large part, in an effort to meet the Court's deadline of September 30 to
complete the ESI production. It is ironic that the plaintiffs now complain about the timing
and the volume of the production when their positions are largely responsible for that
timing and volume.

1 about the massive amount of additional discovery the plaintiffs are now suggesting, any
 2 further discovery during a limited extension must be narrow and focused. The Defendants
 3 believe that an extension of 2-3 weeks, at most, is all that is warranted.

4 The parties' respective positions are as follows:

5 A. Plaintiffs' Position

6 Due to the timing and size of Defendants' ESI production, Plaintiffs request that
 7 the remaining deadlines for discovery in CMO 8, including the deadline for completion of
 8 fact discovery, be extended approximately four months. In the last few weeks,
 9 Defendants have produced literally millions of pages of new documents; these come a
 10 mere two weeks before the close of a nine-month deposition schedule. Plaintiffs have in
 11 place an aggressive plan to review and analyze the new productions but anticipate, given
 12 their volume, that it will take approximately six weeks to get through that process and
 13 then to determine the witnesses who need to be deposed (or re-deposed) based on the
 14 documents. Thereafter, and in light of the intervening Thanksgiving and year-end
 15 holidays, Plaintiffs believe a period of approximately 10-12 weeks for deposition
 16 discovery is appropriate.

17 Accordingly, Plaintiffs propose the following schedule:

18 Deadline for completion of fact discovery: February 28, 2017

19 Plaintiffs' expert disclosure: April 14, 2017

20 Defendants' expert disclosure: May 26, 2017

21 Plaintiffs' rebuttal expert disclosure: June 16, 2017

22 Deadline for completion of expert discovery: August 31, 2017

23 Plaintiffs believe this schedule is reasonable and should not unduly delay
 24 prosecution and resolution of the cases in the MDL. Significantly, this proposed extended
 25 schedule should not affect (or will only minimally affect) the timing of bellwether trials.

26 Case-specific discovery (both fact and expert) for Discovery Group 1 cases could and
 27 should run contemporaneously with the extended common fact and expert discovery.

28 Under CMO 11, the 12 Discovery Group 1 cases will likely not be determined until late

1 December 2016 or January 2017, at which time, the parties and this Court will determine
 2 a scheduling and case management order for those cases. Case-specific fact and expert
 3 discovery in those cases will likely run through July and into August 2017.⁴ Thus,
 4 Plaintiffs' proposed extended schedule should not affect the timing of bellwether trials by
 5 much, in any, amount.

6 B. Defendants' position

7 Defendants do not believe that anything other than a brief 2-3 week extension of
 8 the discovery period is warranted for several reasons. First, the delay in the production of
 9 additional documents and the volume was caused by the plaintiffs. Second, the plaintiffs
 10 have long known about almost every witness that they now seek to depose. Third, the
 11 majority of the witnesses who the plaintiffs seek to depose have knowledge about only the
 12 Recovery Filter or G2 Filter, not the later-generation products that the plaintiffs argue is
 13 the impetus for extending discovery.

14 **IV. Dispute Regarding Additional Depositions**

15 Plaintiffs have requested the depositions of the following Bard corporate
 16 representatives, employees, and/or consultants:

- 17 • Kevin Boyle, current BPV VP of Research & Development
- 18 • Mike Randall, current BPV lead engineer for IVC filters;
- 19 • Scott Randall, former BPV R&D project manager over IVC filters;
- 20 • Kim Romney, current BPV program manager for IVC filters;
- 21 • Mark Wilson, former BPV national training manager;
- 22 • John Kaufman, M.D., a Bard consultant and key opinion leader on IVC filters;
- 23 • Scott Trerotola, M.D., a Bard consultant and key opinion leader on IVC filters;
- 24 • Anthony Venbrux, M.D., a Bard consultant and key opinion leader on IVC filters;

25
 26
 27 ⁴ This assumes 12 to 16 weeks for individual case fact discovery for all 12 cases; followed
 28 by 8 weeks of expert disclosures and 6 weeks of expert depositions (all of which may
 actually be overly ambitious given the case-specific discovery to be taken).

- 1 • S. William Stravropoulos, M.D., a Bard consultant and key opinion leader on IVC
2 filters;
- 3 • Frank Lynch, M.D., a Bard consultant and key opinion leader on IVC filters;
- 4 • Gary Cohen, M.D., a Bard consultant and key opinion leader on IVC filters;
- 5 • John Lehmann, M.D., the former acting and appointed chief medical officer of
6 BPV and a consultant and “principal investigator” of the EVEREST study
7 regarding the G2 IVC filter;
- 8 • John McDermott, former president of BPV;
- 9 • 30(b)(6) deposition relating to Meridian and Denali filters;
- 10 • 30(b)(6) deposition relating to failure rate thresholds; and
- 11 • 30(b)(6) relating to sales and key opinion leaders.

12 Defendants have objected to these depositions on three grounds. First, Defendants
13 contend that the overall number of depositions is disproportionate to the needs of
14 discovery and, thus, object overall to the number of these depositions in addition to those
15 that have already been taken or scheduled in the MDL. Second, as to certain witnesses
16 (Drs. Kaufman, Venbrux, Trerotola, Stravropoulos, and Lehmann), Defendants object that
17 their depositions have previously been taken outside of the MDL and that Plaintiffs have
18 not made the requisite showing under CMO 8 to depose these individuals again. Third, as
19 to Mr. McDermott, there are distinct issues that the parties address below. Finally, with
20 respect to the 30(b)(6) deposition notices, the Defendants contend that the notices are
21 extraordinarily broad, disproportionate to the needs of the case, and would significantly
22 delay discovery.

23 The parties address these disputes in the following sections/matrices.

24 A. Proportionality

25 1. Plaintiffs’ Proportionality Position

26 At the outset, Plaintiffs note that they have been cognizant of the requirements of
27 proportionality under Rule 26 and mindful that depositions were taken prior to the
28 formation of this MDL. Plaintiffs have been judicious in the selection of witnesses for

1 deposition; they have not requested to depose every possible person involved with IVC
2 filters or even most people so involved; nor have they asked to depose again the vast
3 majority of individuals who were deposed prior to the MDL. Rather, except for the early
4 depositions focusing on the FDA Warning Letter and whistleblower Kay Fuller, Plaintiffs
5 have sought depositions of individuals who held key positions as to IVC filters at BPV.
6 However, at any given time, there were between 12 and 15 key positions at BPV
7 responsible for filters; and, more than 40 different people have held those positions over
8 the last 14 years. Additionally, Defendants consulted with multiple outside professionals
9 regarding IVC filters during that time. All of this is compounded by the fact that
10 Defendants marketed and sold seven different devices over that period of time (Recovery,
11 G2, G2 Express, G2x, Eclipse, Meridian, and Denali). Thus, each person in the key roles
12 had distinct responsibility for a distinct product or products.

13 In this MDL, Plaintiffs have focused their deposition discovery on the responsible
14 positions within Bard. Those include senior positions within the departments at BPV
15 (Research & Development (R&D), Marketing, Sales, Quality, Regulatory/Clinical) as
16 well as key positions vis-à-vis IVC filters within those departments. As demonstrated by
17 the chart attached at Appendix A to this Report (which is based on Defendants'
18 organization charts), those positions have had significant turnover over the past 14 years.
19 During that time, BPV has had three Presidents; four Vice Presidents (or equivalent) in
20 R&D; three Vice Presidents in Marketing; three Vice Presidents in Sales; four Vice
21 Presidents in Quality; and three Vice Presidents in Regulatory. Within R&D, there have
22 been six engineers who have had primary or high-level responsibility for IVC filters;
23 Marketing has had at least four separate IVC filter product managers; in Sales, at least
24 seven people have held the national position for training sales representatives, and at least
25 10 individuals have held one of the two or three Regional Manager positions.⁵

26

27 ⁵ As discussed at the June 21 CMC and in the Joint Report and Dispute Matrix Regarding
28 ESI Discovery and Custodians (Doc. 1756), the Regional Managers have been part of the
small number of direct reports to the Vice President of Sales and part of the senior

1 Additionally, C.R. Bard has had another ten individuals who have held positions
2 responsible for IVC filters.

3 Plaintiffs have focused depositions on the people who held the responsible
4 positions, particularly those who held the positions earlier in the relevant time period. The
5 chart at Appendix A identifies which holders of the positions have been deposed (and
6 whether the deposition was in the MDL or before it). In most cases, Plaintiffs have
7 deposed the person or persons who held the responsible position during the time periods
8 of the earlier devices. This is, in part, a product of how Defendants have produced their
9 documents and ESI in this MDL.

10 Earlier in this litigation, Defendants produced documents and ESI they had
11 collected and produced in prior suits. Those documents were collected years ago –
12 between 2004/2005 and 2011. As a result, the produced documents related primarily to
13 Defendants' older devices. Thus, Plaintiffs focused discovery and depositions on the
14 early devices and the individuals who were involved with them.

15 Plaintiffs have largely been waiting on Bard's new productions to take depositions
16 of individuals involved with later-generation devices. Now that Defendants have finally
17 produced their more recent documents, this is the time to depose those individuals who
18 held the key positions when the later devices were developed, manufactured, marketed,
19 and sold.

20 Defendants' delay in production of their ESI and documents is not cause to limit
21 Plaintiffs' discovery from relevant individuals involved with the later devices. If
22 anything, it should justify granting Plaintiffs greater opportunity for depositions, including
23 potentially re-opening depositions of some individuals previously deposed for questioning
24 on the newly produced documents.⁶

25
26 national sales staff for BPV. They are effectively national sales personnel; for this reason,
27 the Court ordered collection and production of their custodial files.

28 ⁶ In all candor, it is virtually impossible for Plaintiffs to know at this time what
depositions they will actually need based on the new productions; Plaintiffs are processing
those collections and have not yet been able to commence their review.

1 Defendants' proportionality argument ignores virtually all the factors relevant to
2 proportionality. Here, the factors favor discovery from the key position holders for each
3 device. There are now more than 1,000 filed cases and multiple cases for each of the
4 seven devices. The case as to each device requires a different set of proof based on facts
5 specific to that device. Because of BPV's turnover at key positions, there is a distinct set
6 of witnesses in the BPV departments for almost every device. It is simply not the case
7 that the deposition of the Vice President of R&D and lead engineer for the Recovery filter
8 can provide the relevant design and engineering evidence for the G2x, Eclipse, Denali, or
9 Meridian filters. Plaintiffs have to depose different people to obtain the relevant
10 information for each device. This is true across virtually all departments.

11 The depositions that Plaintiffs seek, including those identified in this Report, are
12 proportional to the needs of the case. Plaintiffs do not seek to depose every, or even most,
13 Bard employees with relevant information. Their requested witnesses have been targeted
14 based on their positions within Bard as being the people most likely to possess
15 information relevant to a particular device at issue in this MDL. Plaintiffs have deposed
16 very few people who were involved at all with later-generation filters. They seek now to
17 take those depositions.

18 2. Defendants' Proportionality Position

19 According to the plaintiffs, the principal justification for the formation of this
20 MDL, and one of the primary reasons for the plaintiffs to conduct additional discovery,
21 was that the prior decade's worth of discovery focused on older generation filters, and the
22 plaintiffs needed discovery related to Bard's newer generation IVC filters. Instead of
23 pursuing discovery related to the newer generation filters, the plaintiffs admit that they
24 have used the vast majority of the preceding eight months' of discovery to focus, again,
25 on older generation filters. Now, with less than three weeks before discovery is set to
26 close in this MDL, the plaintiffs claim they need substantial time and discovery related to
27 these newer generation filters. However, the plaintiffs' position poses two problems: (1)
28 the plaintiffs' eleventh-hour discovery requests *still* focus primarily on older generation

1 filters, and (2) the plaintiffs have had relevant documents and the identities of witnesses
 2 involved with newer generation filters in their possession since the beginning of this
 3 MDL, if not *years* earlier for the members of the PSC involved in prior litigation. Simply
 4 put, they chose to use their time re-hashing discovery about Bard's Recovery Filter and
 5 G2 Filter, which was their strategic choice and decision.⁷ But this is not sufficient reason
 6 to extend discovery at Bard's expense.

7 The plaintiffs, only very recently, provided notice of their intent to take an
 8 additional 16 depositions, including 13 current of former Bard employees and outside
 9 consultants and 3 extensive 30(b)(6) depositions. The 16 depositions that the plaintiffs
 10 have requested with roughly a month before the close of discovery are in addition to the
 11 31 depositions that have been or are set to be taken in this MDL, and in addition to the
 12 more than 80 depositions that were taken of Bard corporate witnesses (primarily by
 13 members of the PSC) before the MDL was even formed. The plaintiffs base their need for
 14 these additional depositions in large part on their claimed need for additional discovery
 15 regarding Bard's later generation filters. However, the plaintiffs' "justification" is readily
 16 belied by the fact that roughly 10 of the 16 depositions they have requested at the eleventh
 17 hour are *still* focused on earlier generation filters rather than the most recent devices.

18 On February 26, 2016, Bard produced an interrogatory response pursuant to CMO-
 19 8 and as directed by the Court, identifying with great detail 20 employees who had
 20 significant involvement with Bard's later generation filters (the Eclipse, the Meridian, and
 21 the Denali), as well as another 25 employees having a lesser involvement with those
 22 filters.⁸ Despite being notified more than 7 months ago of the identity of 45 potential
 23 witnesses involved with later generation filters, and despite 30 current or former employee

24 ⁷ Indeed, a review of the transcripts of the 28 depositions of Bard corporate employees
 25 (past and present) taken thus far in this MDL shows that the plaintiffs' counsel asked
 26 about the Recovery Filter 2,636 times and the G2 Filter 1,276 times. By contrast, the
 27 plaintiffs' attorneys referenced the Eclipse Filter only 293 times, the Meridian Filter only
 28 132 times, and the Denali Filter only 176 times. And 93% (242 of 260) of the exhibits
 used during the depositions concern the Recovery Filter or G2 Filter.

⁸ A copy of Bard's written interrogatory responses are attached as Appendix C.

1 depositions being taken or scheduled since the inception of this MDL, the plaintiffs have
2 made no effort to obtain deposition testimony from 34 of those 45 employees.

3 For the plaintiffs to now insist they need more time to conduct discovery regarding
4 later generation filters based on the timing of ESI production is not persuasive, given their
5 past lack of significant focus on witnesses or evidence regarding those products during the
6 previous 9 months of discovery. Moreover, although the plaintiffs attempt to blame their
7 delay on the timing of Bard's most recent document productions, they fail to acknowledge
8 that they did not provide Bard their revised agreed upon keyword and fuzziness search
9 terms until *three weeks ago*, on September 14, 2016. The recent productions apply to
10 lesser priority custodians (the vast majority of whom were not involved with newer
11 generation filters), software data, and voluminous shared drive data that the plaintiffs
12 requested. Bard produced all of the deponents' custodian files prior to their depositions,
13 and any delay in finalizing the most recent productions is the plaintiffs' own doing, both
14 through their delay in finalizing their search parameters and their choice of deponents.

15 The plaintiffs' suggestion that they lack significant information regarding the later
16 generation filters is also belied by the fact that they have had an enormous amount of
17 documents regarding those devices for many months, if not years prior to the MDL. The
18 plaintiffs have had thousands of design, testing, regulatory, adverse event, and other
19 "core" documents for Eclipse, Meridian, and Denali in their possession for six months or
20 more. On March 31, 2016, and April 5, 2016, Bard also produced over 25,000 pages of
21 Denali materials and other materials in response to plaintiff's second requests for
22 production, including Design History Files, DFMEAs, testing documents, FDA
23 submissions and correspondence, corrective and remedial action plans, health hazard
24 evaluations, clinical study materials, audit materials, customer letters, complaint tracking
25 analyses, and a 26-page index describing those materials. Corresponding "core" materials
26 for Eclipse and Meridian were produced well before the formation of the MDL, and some
27 updated and additional materials were produced with the Denali materials on April 5,
28 2016. Finally, Bard's adverse event tracking system with reports for all generations of

1 Bard's IVC filters was produced on January 15, 2016, and an updated collection was
 2 produced on June 29, 2016, and July 1, 2016. Despite this, the plaintiffs deposed only 9
 3 of these 45 employees, and asked them only about the Recovery and G2 Filters (including
 4 3 witnesses who were already deposed on the Recovery and G2 Filters).

5 The plaintiffs have had the opportunity for more than sufficient discovery. To
 6 date, the plaintiffs have taken or noticed 30 depositions of Bard corporate witnesses in the
 7 MDL where they have elicited 140 hours of testimony. And the plaintiffs have available
 8 to them more than 80 additional depositions of Bard corporate witnesses that were taken
 9 primarily by members of the PSC before the start of the MDL. The plaintiffs now seek to
 10 expand this considerably, mostly with witnesses who know only about the Recovery and
 11 G2 Filters.

12 Further, the plaintiffs' new Rule 30(b)(6) deposition requests are so vast that they
 13 encompass the entire history of Bard's IVC Filters: the plaintiffs identified approximately
 14 140 topics and subtopics covering a span of over 14 years on issues relating to design,
 15 testing, regulatory affairs, sales, and quality systems for each of Bard's filters.⁹
 16 Deciphering what information these notices are attempting to seek, gathering that
 17 information, and preparing witnesses to respond to these notices, which may require
 18 multiple witnesses per notice, would take months for the witnesses to be adequately
 19 prepared to testify on these overbroad topics. The plaintiffs could have sought all of this
 20 discovery eight months ago, but chose not to do so. They should not be permitted to
 21 extend the discovery period, and the expense and burden to the defendants, merely
 22 because of the strategic choices that they made earlier in this litigation.

23 B. Previously Deposed Witnesses

1. General Statement	
Plaintiffs' Position	Defendants' Position
The following individuals are important witnesses involved with the design, testing, and/or clinical trials as consultants	The plaintiffs have known about these witnesses for many months, and they chose not to seek their depositions until

28 ⁹ A copy of the three 30(b)(6) deposition notices are attached as Appendix D.

1 working for Bard. They were hired by
 2 Bard as key opinion leaders (KOLs) to
 3 lecture and teach other doctors about Bard
 4 IVC filters. Most have been identified by
 5 Bard as witnesses they intend to call at
 6 trial. In all but one instance, these
 7 individuals were deposed five or six years
 8 ago by lawyers that are not part of this
 9 MDL. These depositions were often
 10 limited in scope, were relatively brief, and
 11 failed to address issues of critical
 12 importance to the 1,000 new MDL
 13 plaintiffs.

14 Plaintiffs believe that the knowledge of
 15 what is important to these cases,
 16 developed by the additional thoughts and
 17 analysis of dozens of new attorneys (and
 18 the insights of new experts) is dramatically
 19 different now than the knowledge base that
 20 existed five or six years ago. It would be
 21 extremely prejudicial for all of the new
 22 MDL plaintiffs, and their attorneys, to not
 23 be given the opportunity to examine these
 24 witnesses using new information, exhibits,
 25 and medical and scientific literature that
 26 did not exist at the time of their prior
 27 depositions.

28 now. This is an insufficient reason to
 extend discovery.

1 Although the plaintiffs claim that they
 2 need additional discovery about later-
 3 generation products, 7 of the 13 individual
 4 witnesses whose depositions they seek
 5 have knowledge only about the Recovery
 6 and G2 Filters. The plaintiffs have already
 7 noticed or deposed 31 witnesses in the
 8 MDL almost exclusively about the
 9 Recovery and G2 Filters.

10 Voluminous ESI regarding the basis for
 11 deposing many of these witnesses, such as
 12 the EVEREST G2 clinical study, was
 13 produced to members of the PSC years
 14 before the MDL was formed, and the
 15 plaintiffs waited until the close of
 16 discovery to request their depositions.

17 The plaintiffs provide little to no specific
 18 basis for requesting these depositions.

19 Finally, the consultant physicians the
 20 plaintiffs have requested have active
 21 medical practices, and should not be
 22 burdened with questioning regarding
 23 topics that they have already been deposed
 24 about and which have been covered
 25 elsewhere extensively.

2. Dr. Kaufman

Plaintiffs' Position

1 Dr. Kaufman was deposed on October
 2 28, 2010, by Dean Hartley, who has never
 3 been in the PSC or any of its firms. The
 4 deposition lasted four hours and discussed
 5 15 exhibits.

6 Dr. Kaufman was a key figure in the
 7 filter litigation, having served as a Key
 8 Opinion Leader (KOL) for Bard, working
 9 on the design of the G2 (he holds a patent
 10 for his work), testifying about Bard filters,
 11 and serving as the principal investigator in
 12 the EVEREST Study. Just last week, a
 13 Bard Vice-President testified he wanted
 14 Dr. Kaufman fired for his work on the
 15 EVEREST Study.

16 In state court disclosures, Bard has
 17 listed Dr. Kaufman as one of the witnesses
 18 it intends to call at trial – demonstrating
 19 the importance of this witness and his
 20 information.

Defendants' Position

21 The plaintiffs have known about Dr.
 22 Kaufman, his work with Bard, and his
 23 previous deposition for many months.

24 Although the plaintiffs claim that they
 25 need additional discovery about later-
 26 generation products, their stated reason for
 27 wanting to take Dr. Kaufman's deposition
 28 relates to the G2 Filter.

1 Dr. Kaufman maintains an active clinical
 2 practice and has not had any role with
 3 Bard's later generation filers.

4 Moreover, contrary to the plaintiffs'
 5 statement, John VanVleet, the Vice
 6 President referenced by the plaintiffs, did
 7 not testify that he wanted Dr. Kaufman
 8 fired for his work on the G2 EVEREST
 9 study that was conducted in the mid-
 10 2000s. Instead, Mr. VanVleet explained

	<p>that Bard chose to no longer use a contracting research group to manage the EVEREST study. He explicitly disagreed with the use of term “fired,” and the research group, other than also being involved with the EVEREST study, had no connection whatsoever with Dr. Kaufman.</p> <p>Given the extensive document and witness discovery that has already been taken of witnesses relating to the Recovery and G2 Filters, both before and during the MDL, Bard contends that taking yet another deposition of a witness, such as Dr. Kaufman, focused on Bard’s early generation filters is not proportional to the needs of the case and should not be permitted.</p>
--	--

3. Dr. Venbrux

Plaintiffs' Position	Defendants' Position
<p>Dr. Venbrux was deposed on January 28, 2011, by Jack Davis, a non-MDL attorney. The deposition lasted just over three hours, and discussed 5 exhibits.</p> <p>Dr. Venbrux has been a KOL and paid expert for Bard since 2003, has lectured for Bard since 2003, and has lectured for Bard about IVC filters, as well as conducting animal studies for Bard. As of 2011, he was still working for Bard. His prior deposition was primarily focused on filter fractures, the only failure at issue in the case at issue at that time. He has never been deposed regarding later generation filters.</p> <p>Additionally, in state court disclosures, Bard has listed Dr. Venbrux as one of the witnesses it intends to call at trial – demonstrating the importance of this witness and his information.</p>	<p>The plaintiffs have known about Dr. Venbrux, his work with Bard, and his previous deposition for many months.</p> <p>Although the plaintiffs claim that they need additional discovery about later-generation products, their stated reason for wanting to take Dr. Venbrux’s deposition relates to the Recovery and G2 Filters</p> <p>Given the extensive document and witness discovery that has already been taken of witnesses relating to the Recovery and G2 Filters, both before and during the MDL, Bard contends that taking yet another deposition of a witness, such as Dr. Venbrux, focused on Bard’s early generation filters is not proportional to the needs of the case and should not be permitted.</p>

4. Dr. Trerotola

Plaintiffs' Position	Defendants' Position
<p>Dr. Trerotola was deposed on November 15, 2010, by Jack Davis, a non-MDL attorney, for approximately 3 hours. Eight exhibits were discussed.</p> <p>Dr. Trerotola continues to be listed as a witness Bard intends to call at trial. He has worked as a consultant for Bard since at least 2001 and serves as a KOL for Bard.</p> <p>Additionally, in state court disclosures, Bard has listed Dr. Trerotola as one of the</p>	<p>The plaintiffs have known about Dr. Trerotola, his work with Bard, and his previous deposition for many months.</p> <p>In response to the plaintiffs’ request for all communications between Bard and Dr. Trerotola, Bard referred the plaintiffs to certain communications on March 31, 2016, and produced additional communications to and from Dr. Trerotola</p>

1	witnesses it intends to call at trial – demonstrating the importance of this witness and his information.	2	3	4	on June 20, 2016. Dr. Trerotola was listed in Bard's initial disclosures, and in some members of the PSC's initial disclosures, in non-MDL cases as one of many potential witnesses which the parties reserved the right to call at trial, and the plaintiffs provide no other justification for his second deposition.
---	---	---	---	---	--

5	5. Dr. Stravropoulos	6	
7	<u>Plaintiffs' Position</u>		<u>Defendants' Position</u>
8	<p>Dr. Stavropoulos was deposed on April 13, 2011, by Bard and cross-examined by Dean Hartley (a non-PSC attorney) for approximately one half hour, and as an expert witness for Bard in a personal injury filter case by William Garver (also a non-PSC attorney) on October 16, 2012, for 2 hours and 15 minutes. Both depositions were case-specific depositions.</p> <p>Dr. Stavropoulos is still listed as a witness Bard intends to call in trials. Dr. Stavropoulos worked for Bard as a KOL and on the EVEREST Study. He has worked with several of Bard's consulting team of Drs. Kaufman, Venbrux, and Trerotola in writing papers concerning Bard IVC filters. No MDL attorney has ever deposed Dr. Stavropoulos and his prior depositions were extremely limited.</p>		Both of Dr. Stavropoulos's prior depositions were produced to members of the PSC on September 4, 2012. Again, his involvement with Bard's IVC filters has been known by members of the PSC for years prior to the MDL. Dr. Stavropoulos was listed on Bard's initial disclosures, and in some members of the PSC's initial disclosures, in non-MDL cases as one of many potential witnesses which the parties reserved the right to call at trial, and the plaintiffs provide no other justification for his third deposition.

16	6. Dr. Lehmann	17	
18	<u>Plaintiffs' Position</u>		<u>Defendants' Position</u>
19	<p>Dr. Lehmann was deposed on August 7, 2014, by Wayne Grant (a non-MDL attorney) for approximately 4 hours and by Mr. Lopez on April 2, 2013, for approximately 7 hours.</p> <p>As the Court is aware, Dr. Lehmann has been at the heart of the Bard Filter Litigation, serving as a consultant and the medical director of Bard. He was involved in critical evaluation of early filter performance and the necessity of reporting injuries and deaths.</p> <p>Plaintiffs believe the information and evidence developed since 2013 require further deposition of Dr. Lehmann. The new MDL Plaintiffs and their attorneys have not had the opportunity to question Dr. Lehmann concerning critical new evidence concerning matters such as Bard's misrepresentation of filter</p>		<p>Dr. Lehmann was deposed by Mr. Lopez of the PSC for 7 hours, questioned by Mr. Lopez's co-counsel, Mr. Grant, in a Georgia case for 4 hours, and questioned by a different member of the PSC live at a hearing in Texas federal court.</p> <p>Dr. Lehmann has no new information. Moreover, voluminous documents relating to his involvement with the EVEREST study regarding the G2 Filter were produced years before the MDL was formed, and other than vaguely describing "new evidence" related to their general claims, the plaintiffs do not provide any basis for deposing Dr. Lehmann again. Dr. Lehmann has had no role with the later generation filters. For these reasons, Bard opposes the plaintiffs' request to depose Dr. Lehmann yet again.</p>

1 performance, migration failure results, and
 2 the safety and efficacy of Bard filters.

3 Additionally, other Bard witnesses have
 4 identified Dr. Lehmann as a key
 participant in the EVEREST study, a study
 unrelated to the Lehmann Memo that was
 the subject of a discovery dispute earlier in
 this MDL.

5 **7. John McDermott**

6 Plaintiffs' Position

7 The prior deposition of Mr. McDermott
 8 (the President of BPV from 2003 to early
 9 2007) presents a unique problem. The
 10 MDL attorneys are willing to accept the
 11 prior deposition as to content, but not as to
 12 its form. Specifically, the acrimonious
 13 nature of the questioning and answers of
 14 the videotape deposition make the video
 15 unusable in the opinion of the MDL PSC.
 16 Plaintiffs have proposed resolving this
 17 issue by a stipulation with Defendants that
 18 the McDermott deposition would only be
 19 read at any trial. Defendants rejected this
 20 proposal.

21 It is the position of the MDL attorneys,
 22 therefore, that there is no deposition that
 23 can be used by the MDL attorneys and that
 24 the MDL attorneys should be allowed to
 25 retake this deposition. Alternatively,
 26 Plaintiffs request an order of the Court that
 27 the deposition can only be read at any trial.

5 Defendants' Position

6 Mr. McDermott was deposed in 2010 by
 7 non-MDL counsel, and was deposed again
 8 by Mr. Lopez in 2014 for over 7 hours.
 9 The “acrimonious nature of the
 10 questioning” refers to Mr. Lopez’s
 11 questioning of Mr. McDermott.
 12 Magistrate Judge Cobb in the *Phillips* case
 13 threatened to revoke Mr. Lopez’s *pro hac*
 14 *vice* admission for the very questioning
 15 that the plaintiffs reference. *See Phillips v.*
Bard, 3:12-cv-00344-RCJ-WGC, March
 16 26, 2014 Minute Entry of Proceeding
 17 ((Doc No. 152) where Judge Cobb
 18 “expressed concern regarding plaintiff
 19 counsel’s decorum and professionalism at
 20 the February 5, 2014, deposition of John
 21 McDermott. The court cautions counsel to
 22 adhere and comply with the standards of
 23 professional conduct required of the
 24 members of the bar of this court.”). Bard is
 25 prepared to submit video excerpts so the
 26 Court can fully understand the nature and
 27 context of the examination. Allowing
 28 another deposition of Mr. McDermott
 because of Mr. Lopez’s “acrimonious”
 questioning is not a sufficient reason to
 subject Mr. McDermott to another
 deposition.

Moreover, Mr. McDermott is the former
 President of Bard Peripheral Vascular,
 which is the same role that Mr. Beasley
 fills. The Court already denied the
 plaintiff’s request to depose Mr. Beasley
 on apex grounds (*see* Doc No. 3272). For
 the same reasons, the Court should deny
 the plaintiffs’ request to take Mr.
 McDermott’s deposition.

Mr. McDermott’s time at Bard shows that
 he necessarily has no knowledge of Bard’s
 later-generation filters, which is the stated
 reason that the plaintiffs give for needing
 to extend discovery.

1		Finally, Mr. McDermott is presently the President of Endologix, a publically traded company. He has already given two depositions in this litigation while serving as President of Endologix.
---	--	---

4 C. New Proposed Witnesses

5	1. General	
6	<u>Plaintiffs' Position</u>	<u>Defendants' Position</u>
7	As Plaintiffs articulate above, by and large, they have sought to depose those individuals who have held the key positions within the responsible departments at BPV. With regard to the specific Bard employees at issue at this time, each of them has held a key IVC filter position at Bard, and most of them held it at a time relevant to the later devices on which little discovery has taken place to date. With respect to the outside consultants and advisors, Bard has identified these individuals as key advisors to Bard with respect to IVC filters. They are among a small handful of people that Bard held out to physicians as experts with respect to Bard's IVC filters.	As discussed above, Bard's position is that any alleged lack of discovery regarding newer generation filters is the plaintiffs' own doing, both with respect to the plaintiffs' chosen deponents so far, and the timing of Bard's recent document productions. If the plaintiffs request a very limited number of depositions actually related to newer generation filters, to be completed in a short time frame, and limit their questioning to the newer generation filters, Bard will not oppose those depositions. But, currently, the overall scope and number of the plaintiffs' requested depositions is excessive, particularly given their almost exclusive focus on Recovery and G2 Filters, and the timing of their requests.
16	2. Kevin Boyle	
17	<u>Plaintiffs' Position</u>	<u>Defendants' Position</u>
18	Mr. Boyle is the current Vice President of Research & Development; he has held that position since 2013. As such, he has been the decision maker and responsible person in that department during the research and development of the Meridian and Denali filters.	Based on the fact that the Denali was cleared by the FDA in May 2013, Bard believes that Mr. Boyle will have little to no information that is not available from other sources. He was not identified in Bard's February 26, 2016, interrogatory response.
22	3. Scott Randall	
23	<u>Plaintiffs' Position</u>	<u>Defendants' Position</u>
24	Scott Randall was a Program Director in the Research & Development department; he was a direct report to the Vice President of the department and responsible for IVC filters. In 2012, he was the highest authority in the department while there was no Vice President in place. He was, thus, the decision maker and responsible person at the time for the research and development of the Meridian filter.	Mr. Randall was identified by Bard on February 26, 2016, as having a lesser role with later generation filters. The plaintiffs provide no basis for requesting his deposition nearly at the close of discovery.

4. Mike Randall	
<u>Plaintiffs' Position</u>	<u>Defendants' Position</u>
<p>Mike Randall has been one of the key engineers for IVC filters since 2009. Steve Williamson, BPV's current president, testified that Mike Randall taught him about IVC filters when Mr. Williamson joined the company. Although there have been teams of anywhere from six to eight engineers who have worked on IVC filter, Mike Randall has held a position of responsibility for them, including particularly the Eclipse, Meridian, and Denali filters.</p>	<p>Mr. Randall was identified by Bard on February 26, 2016, as having a principal role with later generation filters. The plaintiffs provide no basis for requesting his deposition nearly at the close of discovery.</p>
5. Mark Wilson	
<u>Plaintiffs' Position</u>	<u>Defendants' Position</u>
<p>Mr. Wilson was the Senior Manager of Training and Development from 2008 to 2010. He is one of the various individuals who have held the position over time that is responsible for the national training of sales representatives. He held the position during the time period of various G2 family of devices. He is the first training manager whose deposition Plaintiffs have requested in this MDL.</p>	<p>The plaintiffs admit that Mr. Wilson was only involved with the G2 Filter for two years. The plaintiffs already questioned Ms. Romney for several hours as a 30(b)(6) witness which covered multiple topics regarding sales and training, including “[t]he procedures and practices for the education and training of sales representatives regarding the sales, marketing or promotion of Bard IVC Filters.” The plaintiffs provide no justification for requesting to depose Mark Wilson at this late stage, particularly given the fact that his role was almost exclusively focused on early generation filters.</p>
6. Kim Romney	
<u>Plaintiffs' Position</u>	<u>Defendants' Position</u>
<p>Defendants have identified Ms. Romney as being a “previously deposed” witness; however, Ms. Romney was not deposed prior to the MDL; nor has she been deposed in her individual capacity as a witness in this MD. Rather, Defendants put her up as the representative on two separate 30(b)(6) topics.</p> <p>Ms. Romney is the current senior product manager for IVC filters at BPV. Plaintiffs believe that she has held that position since 2014 and previously was project manager for IVC filters beginning in approximately 2011. Defendants have held her out as being a most knowledgeable person with respect to</p>	<p>Ms. Romney was deposed twice in 30(b)(6) roles for a total of almost 12 hours and including hours of testimony on sales and marketing. The plaintiffs asserted that they were entitled to ask Ms. Romney questions outside the scope of the deposition based on her own personal knowledge, and did in fact question her in that regard. During those depositions, the plaintiffs already established that that she began working for Bard in June of 2011 as an associate product manager, and questioned her extensively on the organizational charts Bard produced, and which employees held what positions during different timeframes. The</p>

1	filters at BPV. To Plaintiffs'	plaintiffs' professed ignorance regarding
2	understanding, she has been the IVC filter	Ms. Romney's role with Bard's IVC
3	project manager for at least the Denali and	filters, much like their Appendix regarding
	Meridian filters.	"key" witnesses who still need to be
		deposed, is inconsistent with the discovery
		completed in this MDL.

7. Dr. Lynch

Plaintiffs' Position	Defendants' Position
Dr. Lynch has been an outside consultant and KOL for Bard with respect to its filters for a number of years. He is a KOL with respect to the Denali filter, and is identified by Bard in documents as being involved in the investigation and studies that led to the Denali filter.	Members of the PSC have been aware of Dr. Lynch's involvement with Bard's IVC filters for years prior to the MDL, and have been using documents related to him as deposition exhibits for the same amount of time. They provide no basis for requesting his deposition on the eve of the close of discovery, and provide no specific information as to why his deposition is necessary.

7. Dr. Cohen

Plaintiffs' Position	Defendants' Position
Dr. Cohen has been an outside consultant and KOL for Bard with respect to its filters for a number of years. He is a KOL with respect to the Denali filter, and is identified by Bard in documents as being involved in the investigation and studies that led to the Denali filter.	Members of the PSC have been aware of Dr. Cohen's involvement with Bard's IVC filters for years prior to the MDL, and have been using documents related to him as deposition exhibits (primarily related to the Recovery Filter) for the same amount of time. They provide no basis for requesting his deposition on the eve of the close of discovery, and provide no specific information as to why his deposition is necessary.

D. Additional Rule 30(b)(6) depositions

Plaintiffs have requested three additional Rule 30(b)(6) depositions: one relating specifically to Bard's later IVC filter devices (Eclipse, Meridian, and Denali); one relating to certain sales and marketing practices for all Bard IVC Filters, and another relating to failure rate thresholds for all of Bard's IVC filters.¹⁰ Defendants have preliminarily objected to both the proportionality and the scope of these notices. Defendants' position is, based on the current overbreadth of these notices, which may require multiple witnesses per notice, that it would take months for the witnesses to be prepared to testify on these roughly 140 topics. The parties will need to further meet and confer in advance

¹⁰ A copy of the three 30(b)(6) deposition notices are attached as Appendix D.

1 regarding these depositions; however, if they do not reach an agreement, the timing of any
2 such disputes will become significant in light of the current October 28 discovery
3 deadline.

4 **V. Plaintiffs' Request for a Special Master for Depositions**

5 As the parties discussed with the Court during the telephonic hearing on October 3,
6 Plaintiffs request the appointment of a special master for depositions taken in this MDL.
7 Defendants do not agree that a special master is necessary. The parties' respective
8 positions and arguments are set forth below:

9 A. Plaintiffs' Position

10 Plaintiffs contend that a Special Master is necessary at selected depositions going
11 forward. In an effort to secure agreement for a Special Master who could appear
12 telephonically at depositions, Plaintiffs even offered to pay the cost. Nonetheless, Bard
13 refused. Plaintiffs' position is that a Special Master is necessary to avoid the following:

14 1. Diminishment of Plaintiffs' allotted time for questioning:

15 Many of Bard's witnesses (current and former employees represented by Bard's
16 counsel) engage in the practice of evasive answers when responding to Plaintiffs'
17 questions. Particularly problematic has been the recitation of facts not elicited by and
18 unresponsive to questions posed, and unnecessary explanations that are lengthy and non-
19 responsive. Examples of Bards' witnesses' unresponsive answers and Plaintiffs' attorneys
20 attempts to rectify the situation in order to prevent the depletion of the agreed shortened
21 time for questioning that the parties stipulated to at the outset of the litigation are set forth
22 in the matrix attached as Appendix B. At times a question must be repeated and/or
23 rephrased 6-7 before any progress can be made. (*See, e.g.*, Appendix B, citations to
24 testimony of M. Uebelacker (157:3-165:3), J. Sullivan (165:20-169:19).) There are also
25 examples of additional non-responsive information unnecessarily supplied to responses
26 that call for concise answers that remain relevant to the question asked. (*See, e.g.*,
27 Appendix B, Little (226:16-227:5; 229:18-230:19; 230:24-231:21); Raji-Kubba (28:8-17;
28 51:10-24).) These sorts of responses diminish Plaintiffs' allotted time for questioning and

1 are responses that Bard can elicit during its allotted time. On the contrary, when the same
 2 witnesses are on direct examination their responses are on point, concise, and do not take
 3 up unnecessary amounts of time. (*See, e.g.*, Appendix B, J. Sullivan (394:3-409:5); Little
 4 (432:1-442).)

5 The Federal Rules prohibit tactics that impede, delay, frustrate and/or prolong
 6 depositions. Fed. R. Civ. P. 30(d)(1); Adv. Comm. Notes, 1993 Amendments, Subdiv.
 7 (d). The Rules are also clear that a deponent may not delay or frustrate a deposition, and
 8 that even a nonparty deponent may be sanctioned for same. Advisory Comm. Notes, 2000
 9 Amendments, Subdivision (d); *see also* Adv. Comm. Notes, 1993 Amendments, Subdiv.
 10 (d) (“The rule also explicitly authorizes the court to impose the cost resulting from
 11 obstructive tactics that unreasonably prolong a deposition on the person engaged in such
 12 obstruction. This sanction may be imposed on a non-party witness as well as a party or
 13 attorney.”). Although Plaintiffs are not seeking sanctions at this juncture, the request for a
 14 Special Master is warranted in light of the of citations attached from depositions taken
 15 thus far exemplifying the exact conduct prohibited by the Rules which could be remedied
 16 in real time with a Special Master.

17 2. Inappropriate instructions not to answer:

18 At a recent deposition (Sullivan) Bard’s counsel instructed the witness not to
 19 answer on two bases. Plaintiffs’ counsel vigorously disputed both purported justifications
 20 and offered temporary solutions (*e.g.*, sealing the deposition for later review by the Court)
 21 in order to allow the deposition to continue; defense counsel refused. Access to or the
 22 presence of a Special Master would have resolved these issues on the spot rather than
 23 forcing the parties now to reconvene the deposition that, at the time of this filing, will be
 24 at the Plaintiffs’ expense and will require further involvement of the court.

25 The bases for which Bard instructed the witness are as follows:

26 a. *The 2005 Remedial Action Plan (“RAP”)*

27 Plaintiffs attempted to question Mr. Sullivan on the 2005 RAP, a document that

1 quotes directly from the Lehmann Report.¹¹ Counsel instructed the witness not answer on
2 the basis that the copy Plaintiffs' counsel used did not redact the quotes from the
3 Lehmann Report. The Court's Order regarding the Lehmann Report is clear; it only
4 pertains to the Lehmann Report, not to any other document and certainly not to a publicly
5 filed document (Doc. 306-1, Ex. T) created in the usual course of business. Bard sent a
6 letter "clawing back" the RAP despite never having sought a protective order based on
7 privilege and claiming that it had never been produced in the MDL.

b. Documents “deemed” produced in the MDL

9 Bard instructed Mr. Sullivan not to answer questions regarding the RAP claiming
10 that an unredacted copy has not been produced in the MDL and that a pre-MDL decision
11 controls the use of the unredacted 2005 RAP. Bard's assertions notwithstanding, the
12 January 2005 RAP (BPVE-01-01019773-BPVE-01-01019874) has been produced in the
13 MDL, and it has been filed in (Doc. 306-1, Ex. T) and cited by both parties and the Court.
14 (Doc. 699, at 7). Plaintiffs' position is that anything produced prior to this MDL to the
15 original consortium lawyers is deemed produced in this MDL. Plaintiffs previously
16 requested a global index of documents to avoid such situations: Bard refused. Also, Bard
17 has refused to reproduce certain deponents deposed prior to the MDL; yet, the exact copy
18 of the RAP Bard claims was not produced in the MDL is attached to an exhibit to a
19 deposition of a witness Bard refuses to produce again.

20 Bard has since retracted its attempt to clawback the RAP, but has not clarified the
21 basis: Is it not privileged? Is it deemed produced in the MDL? Or both? Although the
22 immediate issues with Mr. Sullivan’s deposition has been resolved, if Bard intends to take
23 positions on documents and their potentially different iterations based on how and when
24 they were produced prior to the MDL, this will be an ongoing issue. Moreover, if Bard
25 intends to assert privileges in the face clear court orders, a Special Master would be useful

27 ¹¹ This Court granted Bard’s Protective Order re: the Lehmann Report; attorney work
28 product (Doc. 699). No other documents were submitted or subjected to the Protective
Order Bard sought.

1 to address these and related issues (such as who will be shouldering the expense for the
2 second deposition of witnesses such as Mr. Sullivan) as they arise.

3 3. State/Federal Coordination:

4 The parties have agreed to coordinate state and federal matters and discovery
5 where possible. A Special Master would be beneficial in resolving issues related to this
6 coordination. For example, Bard has taken the position that depositions cross-noticed in
7 state court cases are under the direction of this court's Case Management's Orders as to
8 time limitations, with no flexibility or reasonable accommodations allowed. At the
9 Sullivan deposition, Plaintiffs' counsel requested, but were denied, ten (10) additional
10 minutes of time to ask questions that were relevant to the upcoming *Austin* trial. Also,
11 Bard's counsel refused to allow State court counsel to ask even a single follow-up
12 question after Bard's counsel had questioned Mr. Sullivan, a former employee of Bard.
13 (Appendix B, Sullivan (388:20-389:21; 413:20-414:17).). Bard's position is that Plaintiffs
14 intentionally ran out their time in order to have additional time under the guise of the state
15 court caption. Plaintiffs deny this vehemently considering the utterly frustrating
16 experience counsel has experienced with evasive and non-responsive answers, instructions
17 not to answer without court order and with a clear court order indicating the contrary.

18 The Rules specifically counsel that "a refusal to agree to a reasonable request for
19 some additional time to complete a deposition" may constitute sanctionable conduct.
20 Advisory Comm. Notes, 1993 Amendments, Subdivision (d). The Advisory Committee
21 further clarified in 2000 that "[i]t is expected that in most instances the parties and the
22 witness will make reasonable accommodations to avoid the need for resort to the court."
23 Advisory Comm. Notes, 2000 Amendments, Subdivision (d). The Committee explained
24 that circumstances where additional time is warranted and should be agreed to without
25 resorting to the court include multi-party cases where various parties (like Austin's
26 counsel) may need to examine the witness, where the lawyer for the witness may want to
27 examine the witness, where the deponent has information regarding a long period of time,
28 and where a large volume of documentary evidence is relevant to deponent's testimony,

1 all of which are applicable here. *Id.*

2 B. Defendants' Position

3 After having taken 28 depositions of Bard corporate employees (past and present)
 4 since the commencement of this MDL,¹⁰ and at the eve of the close of discovery, the
 5 plaintiffs now raise for the first time with this Court the suggestion that a special master
 6 should be employed to oversee any remaining depositions. The defendants strongly
 7 oppose the appointment of a special master because such appointment is both unnecessary
 8 and contrary to the efficiency this MDL was created to promote. The plaintiffs raise three
 9 reasons for wanting a special master at depositions: (1) diminishment of Plaintiffs'
 10 allotted time for questioning (by lengthy answers); (2) inappropriate instruction not to
 11 answer questions by Bard's counsel; and (3) state/federal coordination. None of these
 12 reasons warrants the cost of a special master.

13 First, this litigation does not lend itself to "yes" or "no" answers
 14 generally.¹² Bard's witnesses have answered questions to the best of their ability given
 15 that they are often asked about documents that they have never seen, about actions of
 16 departments that they do not work in, about the intent or motivations underlying someone
 17 else's words or actions, and about highly-scientific and/or highly regulated issues far
 18 outside their known and stated areas of education, expertise, or job functions. In response
 19 to certain of the plaintiffs' questions, to which they demand a "yes or no" answer, some
 20 witnesses have explained that they cannot respond simply "yes" or "no." For example, in
 21 Mr. Sullivan's deposition, at one point after having been repeatedly urged to respond "yes
 22 or no" to get through the deposition quickly, Mr. Sullivan explained his reluctance to do
 23

24 ¹⁰ Attorneys serving as PSC members in this MDL took over 40 depositions of current and
 25 former Bard employees during the years leading up to the inception of this MDL.

26 ¹² Bard's preliminary research supports its position that witnesses are entitled to fairly
 27 explain their answers and that questioner instructions or demands in the manner a witness
 28 must respond is improper, and has in certain instances been considered an intimidation
 tactic. *See e.g., Howard v. Offshore Liftboats, LLC*, 2015 WL 965976 (E.D. La. Mar. 4,
 2015).

1 so with certain questions, explaining that “I just have to be careful that I’m – that those are
 2 my words, right?” Another witness, Holly Glass, testified that she could not answer
 3 certain questions “yes or no” because “[she didn’t] have the background or the clinical
 4 experience or basis to say yes or no to that question truly.” Ms. Glass further explained
 5 her reluctance at answering hypothetical questions because “[she didn’t] have enough
 6 information to give you [the questioner] an informed opinion.” Another deponent, Kevin
 7 Shifrin, declined to answer a question “yes or no” because “[The question] is a complex
 8 one, so a yes-or-no answer I don’t think is representative of my experience in medical
 9 device business.”¹³

10 Second, the plaintiffs’ primary justification for the appointment of a special master
 11 readily demonstrates the fact they have no legitimate basis for such a request. In
 12 particular, they rely principally on events that occurred related to a single document at a
 13 single deposition (Jack Sullivan). At that deposition, a misunderstanding arose about the
 14 privileged nature of a Remedial Action Plan that counsel reasonably believed was
 15 protected work product related to the highly-litigated Lehmann Report. The defendants’
 16 counsel, acting in good faith but under a mistaken belief, instructed a witness not to
 17 answer questions about that one document they thought was privileged. In the “meet and
 18 confer” discussions following the deposition, the defendants acknowledged their mistake
 19

20 ¹³ Rather than unnecessarily burdening the Court with lengthy rebuttal excerpts to put the
 21 plaintiffs’ Appendix A in context, which Bard is prepared to compile if it would be helpful
 22 to the Court, Bard is not providing any excerpts at this time. The parties have reached an
 23 agreement with respect to resolution of any issues arising from the Sullivan deposition. The
 24 minute order of Oct. 3, 2016, gives the parties instruction with respect to the only deposition
 25 occurring before the parties will have an opportunity to discuss these matters with the
 26 Court. If the Court wishes for Bard to submit a rebuttal in advance of the upcoming Case
 27 Management Conference, Bard stands ready and willing to do so. Bard believes that a fair
 28 reading of the depositions in their entirety demonstrate that these lay witnesses were
 responding to the best of their ability even when asked in detail and at length about
 documents with which they had no personal knowledge, or areas far beyond their area of
 expertise and experience. This is supported by the fact that, thus far, no party has sought
 this Court’s input or guidance regarding the manner in which the deponents are responding.

1 and acceded to the plaintiffs' demands to "cure" the situation. For the plaintiffs to now
2 rely on a single mistake, frankly acknowledged and readily corrected in a professional
3 manner, as a global justification for a special master at all future depositions, is not
4 supportable.

5 Third, at this late stage in discovery, the cost and burden of a special master is not
6 warranted. A special master at this late stage would only delay the completion of
7 discovery and overcomplicate matters. The deposition process would require that all
8 depositions be coordinated with not only the schedules of counsel for the parties and the
9 witnesses themselves, which has proven challenging by itself, but then also require that all
10 depositions be coordinated with and scheduled around the special master's calendar,
11 which will serve only to further complicate and delay the completion of discovery.

12 Additionally, the issues, themes, and defenses that pervade these cases involve
13 highly complex concepts of medical science and regulatory interpretation that cover a
14 fifteen-year time period, with many different individuals and entities at play. The time
15 and resulting expense that would follow should a special master now attempt to delve into
16 these issues would be immense. This is not the kind of litigation where even the most
17 experienced litigator could oversee a fact witness deposition without a great deal of
18 preparation.

19 Finally, although the plaintiffs say that they are willing to bear the cost of a special
20 master themselves, the prospect of the plaintiffs alone incurring this significant and
21 unnecessary cost raises many of the same concerns the defendants had with the plaintiffs'
22 initial proposal related to their common benefit fund – it is reasonable to expect that such
23 costs will be ultimately passed off to the defendants by way of increasing settlement
24 requirements.

25 Rather than appoint a special master, Bard respectfully requests that if issues arise
26 during a deposition, the parties first take those issues up with this Court to resolve (which
27 the plaintiffs have not done to date despite allegations of continuous deposition
28 misconduct), as the Court has suggested in the past. If and when the Court is called upon

1 to resolve disputes relating to a specific deposition, the parties can then apply the Court's
2 rulings as guidelines to future depositions, without burdening the Court or undertaking the
3 cost and burden of a special master.

4 DATED this 10th day of October 2016.

5 GALLAGHER & KENNEDY, P.A. SNELL & WILMER L.L.P.
6
7 By: s/ Paul L. Stoller By: s/ Richard B. North, Jr.
8 Robert W. Boatman (009619) James R. Condo
Paul L. Stoller (016773) Amanda C. Sheridan
Shannon L. Clark (019708) One Arizona Center
2575 East Camelback Road 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85016-9225 Phoenix, Arizona 85004-2202
9
10 Ramon Rossi Lopez Richard B. North, Jr. (admitted *pro hac*
11 (admitted *pro hac vice*) vice)
CA Bar No. 86361 Georgia Bar No. 545599
12 LOPEZ McHUGH LLP Matthew B. Lerner (admitted *pro hac*
13 100 Bayview Circle, Suite 5600 vice)
Newport Beach, California 92660 Georgia Bar No. 446986
14 Attorneys for Plaintiffs Nelson Mullins Riley & Scarborough
15 LLP 201 17th Street, NW / Suite 1700
16 Atlanta, GA 30363
17
18 **CERTIFICATE OF SERVICE**
19 I hereby certify that on October 10, 2016, the foregoing was electronically filed with
20 the Clerk of Court using the CM/ECF system which will automatically send email
21 notification of such filing to all attorneys of record.
22
23
24
25
26
27
28

s/ Deborah Yanazzo